No. 5659

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff and Appellant,

vs.

JACKSON ET AL.,
Defendant and Respondent.

BRIEF FOR APPELLANT

GEORGE J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Asst. United States Attorney.

Neal, Stratford & Kerr, S. F.

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STATEMENT OF THE CASE.

This case was an appeal from a judgment of the District Court of the Northern District of California rendered by his Honor United States District Judge Frank H. Kerrigan, for the defendants and cross-complainants in an action to quiet title brought by plaintiff on behalf of an Indian, its ward, and comes here on an agreed statement under Equity Rule 77, by the stipulation of which the opinion of Judge Kerrigan (Appendix A) is made the agreed facts.

This action was brought to cancel a deed conveying certain lands in Humboldt County, California, which were entered by and patented to one Jack Williams, a

tribal Indian, as a homestead under the provisions of Title 43, Section 190, U. S. Code, Act of July 4, 1884, 23 Stat. 96, reading as follows:

> "That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land officers, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, by his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatso ever."

The patent which was issued in conformity with the above provisions was dated December 11, 1891, and contained in specific terms, a declaration to the effect that the United States would hold the lands for the period of tweny-five years in trust for the sole use and benefit of said Jack Williams, or in case of his death, of his widow and heirs, and that at the expiration of said period the United States would convey said lands by patent to him, or his widow or heirs, in fee, dis-

charged of said trust and free of all charges or incumbrances whatsoever.

As the trust thus declared would terminate December 11, 1916, it is argued that at the time when the deed in question was executed, March 18, 1921, the grantor herein, the widow and sole heir of said Jack Williams who had died prior to the termination of the trust, was entitled, under the law, to have the said lands conveyed to her, in fee, discharged of the trust, and she could therefore alienate the same, with the result that although no such patent in fee was ever issued to her, her conveyance to Jack Jackson, from whom the defendants herein derive their title to said lands, must be held to be good.

It is contended by the Government, however, that no such result came about because the period of the trust was continued by a series of Executive Orders making one-year extensions from 1916 to 1919, inclusive, and a further extension in 1920 for a period of twenty-five years. Authority for the issuance of these Executive Orders is claimed under the following provisions of the Act of June 21, 1906, 34 Stat. 325-326, Title 25, Section 391, U. S. Code:

> "That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

The question which arises here is as to the applicability of these statutory provisions to lands entered

and patented as a homestead under the provisions of the Act of 1884, *supra.*

The trial court in deciding the question adversely to the Government held that such provisions are limited to Indian allottees and can not apply to Indian homesteaders; that the Executive Orders purporting to extend the period of restrictions, as far as the Act of 1884 is concerned, are without effect, and consequently, they can not affect the validity of the said deed. Other questions involved in the case and dealt with by the court in its memorandum opinion are not disputed here and will not, therefore, be considered. Copy of the memorandum opinion will be found at Appendix A.

There is no previous decision by the courts bearing directly upon the question presented in this case. The case of Seaples v. Card, 246 Fed. 501, cited by Judge Kerrigan in support of his decision is not in point. In that case the question decided by the court was as to the authority of the Secretary of the Interior under the Act of May 8, 1906, 34 Stat. 183, amendatory of Section 6 of the General Allotment Act of 1887, 24 Stat. 388, to cancel patents issued to Indians under the Act of March 3, 1875, 18 Stat. 420, or the Act of 1884, *supra.* It was therefore in reference to that question that the Court in the Seaples Case said, at page 506:

> "This act is by its terms limited to Indian allottees and confers no authority upon the Secretary of the Interior to cancel patents issued under the act of 1875 or the act of 1884. Why the Secretary of the Interior should be authorized to remove the restriction on alienation in the case of

> Indian allottees, and not of Indian homesteaders, under the acts of 1875 and 1884, I do not know, and am not at liberty to inquire. Suffice it to say that Congress has spoken, and has granted the authority in the one case, but not in the other. If I am correct in these conclusions, the order cancelling the trust patent was erroneous."

Conceding that the word "allotment" is not a term of sale or grant as the word "homestead" would seem to be, but a term of apportionment of that to which the allottee was originally entitled as a matter of right, Parr et al. v. United States et al., 153 Fed. 462, and conceding further that the word "allottee" would not necessarily include an Indian homesteader, still the decision of the trial court in this case is unsound; for the question here is not as to the strict meaning of the words employed in the act, but as to the real intention of Congress in the use of the same.

It is unquestioned that in the construction of statutes the intent of the law makers must be found in the statutes themselves, the presumption being that language has been employed with sufficient precision to disclose the intent. But when, as in this case, the particular word used in the statute has been also employed by the law makers in other legislation of the same character to designate a different class of persons than those to which the statutory provision in question would seem to refer in the ordinary meaning of such word, the courts enforce the statute as intended instead of, as written. For this purpose it is a familiar principle that the courts have power and will in suitable cases examine legislation *in pari materia* in order

to determine the real intention of the statute in question.

Tiger v. Western Investment Co., 221 U. S. 286, 305;
United States v. Freeman, 3 How. 556;
United States v. Hemmer, 195 Fed. 790, 806.

As was aptly observed in the case of Jim Crow, 32 L. D. 658, 659, the Act of 1884, *supra,* was soon thereafter followed by the General Allotment Act of 1887, *supra,* which after providing in Section 1 for allotments of lands upon Indian Reservations, declared in Section 4 that any Indian not residing upon a reservation who shall make settlement upon lands of the United States may have the same allotted to him and his children in quantities and manner prescribed for Indians residing upon reservations, the provisions in the Act of 1887 as to the form, effect and conditions of patents to be issued being the same as those in the Act of 1884. The General Allotment Act, so far as it affects public lands, and the preceding provisions of the Act of 1884 regarding Indian homesteads are so clearly connected that they should be construed in *pari materia* as relating to the same subject matter, the purpose of the later allotment act evidently being to carry forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

That Congress has recognized that Indian allotments are of the same nature as Indian homesteads is clearly evident from various acts relating to matters more or less connected with the subject. See act of

March 3, 1891, 26 Stat. 989, 1007; Act of June 25, 1910, 36 Stat. 855, and act of February 8, 1887, *supra*. It is significant that in the last mentioned act, which is the General Allotment Act, Congress indiscriminately uses the word "allottee" to designate the Indians who are to be allotted upon Indian Reservations under Section 1, and the Indians who are to be granted homesteads upon lands of the United States under Section 4, referring to the latter as *allotted* Indians while in the act of 1891, it characterizes claims under the General Allotment Act as homesteads. It would seem, therefore, that claims under the various laws relating to Indian homesteads may with propriety be characterized as allotments, and an Indian homesteader as an allottee, the difference, if any, between the two terms merely relating to the original character of the lands upon which the allotment is made. So far as the laws in which they are found affect the public lands, and so far as the interests of the Indian claimants are concerned, it may be truly said that the two terms practically mean the same thing.

That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads does not seem to have been questioned by Judge Kerrigan. This power, however, can not be doubted in view of the decision in the Tiger Case, *supra*, which although relating to allotments, applies with equal force to a case like this. As stated in the case of United States v. Hemmer, 195 Fed. 790, which involved a question under the Indian homestead act,

> "Congress has the power to determine when the guardianship which is maintained over the Indians

> shall cease, and may extend the period of limitation on the alienation of lands by an Indian at any time before the issuance to him of final patent."

That the Interior Department has complete jurisdiction over the public lands until title passes has never been doubted nor denied. See United States v. Hemmer, *supra.*

On the other hand, it is of great importance to observe, that as stated in the case of Toss Weaxta, 47 L. D. 574, 579, the Interior Department has all along treated Indian homesteads upon practically the same footing as Indian allotments, and as equally coming within the purview of the statutory provision here in question, considering for purpose of *pari materia* laws, the condition and standing of the Indians, and the obligations of the Government toward them.

See also

26 L. D. 34;
32 L. D. 657;
32 L. D. 291;
37 L. D. 291.

Even though the question presented in this case is said to be a doubtful one, when the meaning of a statute is doubtful, the construction given by the Department charged with its execution should be given controlling weight.

United States v. Cerecedo Hermanos y Compania, 209 U. S. 337;

Robertson v. Downing, 137 U. S. 607;

United States v. Healy, 160 U. S. 136.

And a settled construction by a Department of the United States of the laws of the United States will not be overturned by the courts unless such construction is clearly wrong.

United States v. Hemmer, supra;
United States v. Healy, supra;
Hewitt v. Schultz, 180 U. S. 139;
United States v. Finell, 185 U. S. 236.

The courts have invariably declined to disregard or over-rule the construction placed upon statutes by the Executive Department charged with their administration "except for cogent reasons and unless it is clear that such construction is erroneous", (United States v. Johnston, 124 U. S. 236, 253), or, "unless a different one is plainly required" (Hawley v. Diller, 178 U. S. 476, 488). The Supreme Court, in speaking of a long continued practice of the Interior Department, said:

> "Its (Congress') silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

United States v. Midwest Oil Co., 236 U. S. 459, 481.

Futhermore, the statute should be construed in the light of its obvious policy to protect the Indian against their own improvidence in the matter of disposing of their lands.

Levindale Lead and Zinc Mining Co. v. Coleman, 241 U. S. 433

This policy the trial court entirely overlooked.

WHEREFORE it is submitted that the counter claim of the defendant should have been dismissed and title to the premises in question quieted in the plaintiff on behalf of Bob Roberts, a tribal Indian, its ward, since no power of alienation had theretofore existed in anyone with respect to said premises.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Asst. United States Attorney.

APPENDIX A

UNITED STATES v. JACKSON ET AL.,

District Court, N. D. California, N. D.
July 31, 1928.

No. 245

27F. (d) 751

KERRIGAN, District Judge. This is an action to quiet title to certain lands, brought by the United States on behalf of Bob Roberts, a tribal Indian. A trust patent to the lands in question was issued to Jack Williams, also an Indian, December 11, 1891, in accordance with the act of July 4, 1884, c. 180, Sec. 1 (25 Stat. 96; USCA tit. 43, Sec. 190). This patent, in conformity with the statute, declared:

> "Now know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the said Act of Congress of July 4, 1884, hereby declare that it does and will hold the land described above for the period of twenty-five years in trust for the sole use and benefit of the said Jack Williams, or, in case of his decease, of his widow and heirs according to the laws of the state where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Jack Williams, or his widow or heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The trust thus declared would terminate December 11, 1916. Jack Williams died January 24, 1916, and the land passed to Nellie Williams, an Indian woman, his widow and sole heir. March 18, 1921, she executed the deed to Jack Jackson, also an Indian, which is the deed sought to be attacked in this action. This deed was recorded November 3, 1922. It was not, and never has been, approved by the Secretary of the Interior.

Nellie Williams died October 10, 1922, leaving a will by which this same property was devised to Bob Roberts. The will and the devise were approved by the Secretary of the Interior December 1, 1923. Jack Jackson has since died. The defendants herein are his heirs.

Admitting that the restriction on alienation originally contained in the trust patent issued to Jack Williams would have expired in December, 1916, the government contends that such restriction was extended by a series of executive orders making one-year extensions from 1916 to 1919, inclusive, and a further 25-year extension in 1920, and that the conveyance to Jack Jackson, having been made while there was a restriction on alienation imposed by law, was void.

The executive orders in question each recite that they are made under authority found in the Act of June 21, 1906 (34 Stat. pp. 325, 326; USCA tit. 25, sec. 391). This act provides:

> "Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

(1) It will be noted that this statute refers to "any Indian allottee". Jack Williams was not an allottee. He received his trust patent, not under Act. Feb. 8, 1887, (24 Stat. 388; USCA tit. 25, sec. 331, et seq.), creating the Indian allotment system, or any of its subsequent amendments, but under the Act of July 4, 1884, above referred to, conferring homestead entry rights upon Indians. There is no statute which expressly extends the restrictions upon alienation contained in patents issued to Indian homesteaders, or authorizes the President to do so.

The question of the distinction between an Indian homesteader and an Indian allottee was presented to the court in Seaples v. Card (D. C.) 246 F. 501. There an Indian homesteader had received a fee-simple patent under authority of the Act of May 8, 1906, (34 Stat. 183; USCA tit. 25, Sec. 349), permitting the issuance of a fee-simple patent to an Indian allottee determined by the Secretary of the Interior to be competent to manage his own affairs at an earlier time than the end of the restricted period, Judge Rudkin, after quoting the statute, says (page 506):

> "This act is by its terms limited to Indian allottees and confers no authority upon the Secretary of the Interior to cancel patents issued under the act of 1875 or the act of 1884. Why the Secretary of the Interior should be authorized to remove the restriction on alienation in the case of Indian allottees, and not of Indian homesteaders, under the acts of 1875 and 1884, I do not know, and am not at liberty to inquire. Suffice it to say that Congress has spoken, and has granted the authority in the one case, but not in the other."

(2) The same distinction exists in the present case, and I must hold that the executive orders purporting to extend the period of restriction are without effect as far as Indian homestead lands entered under the Act of July 4, 1884, are concerned. Accordingly, it appears that the patentee would have been entitled to a fee-simple patent December 11, 1916, there being no extension of the period of restriction as to him, and a valid conveyance might be made by him or by his heirs at any time subsequent.

(3, 4) It is further urged in the present case, however, that the deed in question was void on account of its failure to conform to the statutory requirements as to form and approval by the Secretary of the Interior prescribed by R. S. Sec. 2103 (USCA

tit. 25, Sec. 81). Reading of this statute discloses that it applies to contracts with tribal Indians as to services relative to their lands, or to claims or demands due to the tribe or the individual under laws or treaties with the United States. It is not applicable to the conveyance by Nellie Williams to Jack Jackson. Contracts made by Indians, not prohibited by statute, are valid, if they conform to the law of the state where they are made. No statute has been called to my attention which prohibits the conveyance which is the subject of this suit, nor prescribes its form. Its form is according to the laws of the state of California, and it has been duly placed on record.

For the reasons set forth above, let judgment be entered for defendants and cross-complainants.

APPENDIX B

TOSS WEAXTA

Decided September 29, 1920.

INDIAN HOMESTEADS—TRUST PERIOD.

The trust period prescribed in trust patents issued under the act of July 4, 1884, runs from the date of issuance of such patent.

ACT OF JUNE 21, 1906—EXTENSION OF TRUST PERIOD.

Indian homesteads and Indian allotments are in all essential respects upon the same footing and are equally within the purview of the act of June 21, 1906, which affords authority for the extension of the trust period in the matter of trust patents issued thereon.

VOGELSANG, First Assistant Secretary:

This appeal is filed on behalf of Toss Weaxta, a full-blood Indian of the Nooksack tribe, from decision of the Commissioner of the General Land Office, dated March 15, 1919, denying his application for issuance of fee patent upon his Olympia homestead entry for lot 6, Sec. 7, lot 3, SE¼ NW¼ and S½ NE¼, Sec. 8 T. 38 N. R., 5 E., W. M. Washington.

The homestead application of Toss Weaxta was filed August 25, 1887, and it appears from indorsements on the papers that his entry was treated as one made under the Indian homestead act of July 4, 1884 (23 Stat. 96). He was not required to pay fees and commissions as is done under the act of March 3, 1875 (18 Stat. 420), which extends the benefits of the homestead law to Indians. The act of 1884 provides:

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now

be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appreciated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The Indian submitted final proof and a final certificate was issued, but he paid no final fee in connection therewith. Trust patent was issued December 11, 1891, in accordance with the above provisions of the act of July 4, 1884. The twenty-five year trust period would have expired under the patent on December 11, 1916, the Department and the courts holding that the trust period begins to run from the date of the trust patent. Klamath allotments (38 L. D., 559, 561); United States v. Reynolds (250 U. S. 104, 109). But on February 23, 1916, the trust period was by order of the President extended for one year, and similar action has been taken in subsequent years. These orders were under authority found in the act of June 21, 1906 (34 Stat. 325, 326), which provides "that prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

The above provisions have been invoked and applied indiscriminately as containing authority for the extension of the trust period in the matter of both allotments and Indian homesteads. It is contended, however, that an Indian homestead is not an Indian allotment, and that the act of June 21, 1906, by its terms limits the authority to extend the trust period to "Indian allotments only".

There are two what are known as Indian homestead acts—that of 1875, which granted to a specific class of Indians, those who had abandoned or should abandon their tribal relations, the right to homesteads on the public lands under a restriction against alienation for five years from date of patents; and that of 1884, a general law, which granted to Indians whether they had abandoned their tribal relations or not, rights to homesteads, subject to restrictions for twenty-five years on their alienation. Hemmer v. United States (204 Fed. 828); United States v. Hemmer (241 U. S. 379). The benefits of the acts of 1875 and 1884 are conferred upon Indians as such, and prior to said acts Indians, even

though living apart from their tribes, could not make homestead entry on the public domain. United States v. Joyce (240 Fed. 610, 614). These acts were followed soon after by the general allotment act of February 8, 1887 (24 Stat. 388), which, after providing for allotments of lands in Indian reservations, declared in section 4 thereof that any Indian not residing upon a reservation who should make settlement upon public lands might have the same allotted to him and his children in quantities and manner prescribed for Indians residing upon reservations. The provision in the act of 1887, as to the form, effect, and conditions of patents to be issued is the same as that of the act of 1884. Summarizing the acts of 1875 and 1884, the court in the case of Entiat Delta Orchards Co. v. Unknown Heirs of Saska (168 Pac. 1130, 1133), said:

Under the act of 1875, if an Indian had abandoned his tribal relations, he might upon satisfactory proof of that fact take up public land. He would be required to pay the fees provided by law or prescribed by the Department. In consideration of his abandonment of tribal relations, customs, and restraints, the limitation upon his right to convey or incumber his land was fixed at 5 years. Under the act of 1884, an Indian who had not served his tribal relations, but who stood in the attitude of dependency as one of a tribe and as a ward of the Government, might nevertheless avail himself of the homestead law, but by reason of his tribal character and his dependency as a ward of the Government, no fees for filing or making proof were to be exacted of him, and for like reason his title was to be retained by the Government for a period of 25 years. This reasoning is strengthened by reference to the act of 1887, which may be justly regarded as a legislative interpretation. It makes one qualified under the act of 1875 a full citizen, whereas one who might be qualified under the act of 1884 would not be affected by it.

The fourth section of the act of 1887, although the lands taken thereunder are on the public domain, refers to the lands so taken as allotments. This is against the contention of Toss Weaxta on appeal that the terms "allottee" and "allotments" as defined in the cases cited by him, are necesarily confined or limited to the dividing up of reservation lands or common tribal property.

The Department all along has considered Indian homesteads and Indian allotments upon the public lands as being upon practically the same footing, and Congress has recognized the similarity. An Indian allottee, by virtue of the approval of his allotment by the Secretary of the Interior, acquires equitable title in the land but the legal title remains in the Government. This is equally true of an Indian homesteader under the act of 1884. In the case of Parcher v. Gillen (26 L. D., 34, 41, 43), after referring to the statutes defining the powers and duties of the Department and various decisions of the Supreme Court relating thereto, it was said:

A consideration of these decisions interpreting the statutes defining the authority and duties of the officers of the Land Department clearly demonstrates that so long as the legal title remains in the Government the lands are public within the meaning of those statutes and the laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior. * * *

So long as the legal title remains in the Government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition, and with it and not before does the supervisory power and duty of the Secretary cease.

It was held in the case of Doc Jim (32 L. D. 291, 293):

Both the acts of 1875 and 1884 provide special rules and limitations not applicable to other homestead cases, and impose certain restrictions, as to encumbrance and alienation, upon the title the beneficiaries secure. The language of section 5 of the act of February 8, 1887, (24 Stat. 388, 389), with respect to the issuance of patents upon Indian allotments and the trusteeship of the United States, closely follows that of the act of 1884 with respect to Indian homesteads. It is well settled that the issuance of the first or trust patent on an allotment does not terminate the jurisdiction of the Department. Until the issuance of final patent the allottee remains as a ward subject to guardianship whose rights the Department is bound to protect. The language of the act of 1884 is undoubtedly susceptible of the same construction, and all the reasons for the exercise of the protecting care of the Government in the case of an Indian allottee are equally applicable in the case of the Indian homesteader.

In the case of Him Cros (32 L. D. 657, 659), wherein it was held that the provisions of the act of May 27, 1902 (32 Stat. 245, 275), authorizing the sale and conveyance of inherited Indian lands by the heirs of a deceased allottee, applied to the heirs of all Indian claimants for portions of the public lands to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws, it was said, referring to the acts of 1875 and 1884:

The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions are so clearly connected that they should be construed in *pari materia* as relating to the same subject matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund had been provided for assisting Indian homesteaders and carried upon the books of the

Treasury Department under the title "Homesteads for Indians", and by the act of March 3, 1891 (26 Stat. 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take homesteads under section 4" of the act of February 8, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal property be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the Government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is obtained by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department. (Doc. Jim, 32 L. D. 291). These rules apply also to Indian allotments. The control, jurisdiction, and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the Government are the same. Both the legislative and the executive branches of the Government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the Government.

The act of June 25, 1910 (36 Stat. 855), authorizing the Secretary of the Interior to determine the heirs of deceased Indians, provides "that when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent," etc. In an opinion by the Solicitor for this Department dated December 22, 1917, in the matter of determining the heirs to the estate of Ann Tellop Towtex, a Yakima Indian, which consisted of an Indian homestead under the act of 1884, it was held, after referring to the act of 1910,

> "By the express terms of this act the Department's jurisdiction to determine the heirs of deceased Indians continues until legal title passes from the United States by the issuance of final or fee patent. The act is equally applicable to both Indian homesteaders and Indian allottees to whom trust patents have been issued."

It was said in the case of Robinson v. Steele (157 Pac. 845, 848), after discussing the acts of 1875 and 1884 and numerous decisions thereunder:

"That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads between the time of the making of the original entry by a claimant and the time of the perfection of his title by making final proof is settled by the decisions of the federal courts. United States v. Allen, 179 Fed. 13, 103, C. C. A. 1; United States v. Hemmer (D. C.), 195 Fed. 790; Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578; 55 L. Ed. 738.

It was earnesly contended in the Oklahoma case of United States v. Allen, supra, "that after allotments had been made subject to a specific limitation, the Government was without power to enlarge the period of that limitation; that the Indian obtained a vested right to his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th amendment to the Constitution." But the court held "so long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the Federal Government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the National Government. Congress has from time to time asserted this authority, and to hold that its enactments in that respect are unconstitutional would be disastrous to the Indians and would probably still further confuse the already complicated title to lands in Oklahoma."

The case of Seaples v. Card (246 Fed. 501), is cited in support of the brief. It is not regarded, however, as necessarily controlling here. The question of the extension of the trust period on Indian homesteads was not involved in that case, nor is the question of the cancellation of Indian homestead patents involved here. The court merely held that the act of May 8, 1906 (34 Stat. 182), amendatory of section 6 of the act of February 8, 1887, while authorizing the Secretary of the Interior in his discretion to issue fee patents to Indian homesteaders under the latter act, did not in terms authorize him to cancel patents issued under the acts of 1875 and 1884. The power to extend the trust period on Indian homesteads is a different proposition and is by analogy and implication, if not directly, found in the act of June 21, 1906, and directly in the policy of the Government looking to the benefit and protection of its Indian wards so long as their property remains under its jurisdiction.

The case of United States v. Senfert Bros. Co. (233 Fed. 579), also cited in the brief, is not in point for the reason that an Indian homestead was not involved, but one made under the regular homestead laws by an Indian who had become a citizen by reason of an allotment on the reservation of his tribe. The Department itself has taken the position that "the provisions of the act

of May 8, 1906, supra, clearly embrace Indians to whom allotments have been made, as such, and not those who by reason of their position have been allowed to make homestead entry as citizens of the United States." Instructions (37 L. D. 219, 225).

That the Department has complete jurisdiction over the public lands until title passes has never been doubted nor denied. As stated in the case of United States v. Hemmer (195 Fed. 790), which involved an entry under the Indian homestead act, "Congress has the power to determine when the guardianship which is maintained over Indians shall cease, and may extend the period of limitation on the alienation of lands by an Indian at any time before the issuance to him of final patent."

"The Department has treated Indian homesteads upon practically the same footing as Indian allotments, and as therefore equally coming within the purview of the act of June 21, 1906, considering the purposes of *pari materia* laws, the condition and standing of the Indians, and the obligations of the Government. The courts have invariably declined to disregard or overrule the construction placed upon statutes by the Executive Departments charged with their administration "except for cogent reasons and unless it is clear that such construction is erroneous" (United States v. Johnston, 124 U. S. 236, 253), or, "unless a different one is plainly required" (Hawley v. Diller, 178 U. S. 476, 488). The Supreme Court, in speaking of a long-continued practice of this Department, said: "Its (Congress) silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." United States v. Midwest Oil Co. (236 U. S. 459, 481)."

The decision of the Commissioner of the General Land Office herein is affirmed.